No. 11830

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CLARANCE A. REES and EVELYN E. REES, bankrupts,
Appellants,

vs.

SOREN N. JENSEN and ANNA JENSEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

COLVIN & WILLIAMS,
Attorneys for Appellants.

DAVID J. WILLIAMS,
MARY E. BURRUS,
of Counsel.
Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 11830

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARANCE A. REES and EVELYN E. REES, bankrupts,
Appellants,

vs.

SOREN N. JENSEN and ANNA JENSEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

COLVIN & WILLIAMS,
Attorneys for Appellants.

DAVID J. WILLIAMS,
MARY E. BURRUS,
of Counsel.
Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

TABLE OF CASES

STATUTES

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARANCE A. REES and EVELYN E. REES, bankrupts, *Appellants*, vs. SOREN N. JENSEN and ANNA JENSEN, *Appellees*.	No. 11830

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

In reply to the answering brief of appellees, we will more fully elaborate on the law as applicable to this case, and then show that the conversion involved here was not a "wilful and malicious injury to property" within the purview of the Bankruptcy Act.

The burden of proving that the conversion was a wilful and malicious injury to property and that therefore the judgment based upon that conversion was not discharged in bankruptcy is upon the appellees. The authority for this proposition was set forth in appellants' brief. In their comment upon the question of the burden of proof, the appellees do not deny or in any way present authority contrary to this proposition. We take it that it is then admitted that

our statement of the law on this point is correct and that no further comment is necessary.

The appellees would have us believe that an "intentional conversion is a wilful and malicious injury to the property of another." This is not the law! We have cited in appellants' brief the leading case of *Davis v. Aetna Acceptance Co.*, 293 U. S. 328, 331, 332, 333, 55 Sup. Ct. 151 (1934) wherein Mr. Justice Cardozo, speaking for the Supreme Court, said:

> "There is no doubt that an act of conversion, if wilful and malicious, is an injury to property within the scope of this exception. * * * But a wilful and malicious injury does not follow as of course from every act of conversion, without reference to circumstances. * * * The discharge will prevail as against a showing of conversion without aggravated features."

This case is the latest expression by the Supreme Court of the United States of the law with respect to the dischargeability in bankruptcy of a liability arising from a conversion—the law which covers the instant case. We have in addition cited in appellants' brief many more cases which follow the *Davis* case, *supra*. All of these cases are authority for the proposition that a conversion without aggravated circumstances is not a wilful and malicious injury; they contrast the innocent and technical conversion with those which are wilful and malicious. The fact that a conversation is intentional does not *per se* make it wilful and malicious. Every act which constitutes a conversion must be intentional, otherwise it would never be done. The test should be—was the intent

wrongful, wilful, and malicious? The case of *Brown v. Garey*, 267 N.Y. 167, 196 N.E. 12 (1935), cited in appellants' brief, states:

> "Since a wrongful intent is not an essential element of conversion, an act of dominion done under mistake or misapprehension, and without conscious intent to violate right or authority, may yet be a conversion; but it is not a wilful and malicious conversion."

The many cases cited by the appellants' in their brief are not discussed or distinguished by the appellees in their brief. We shall, therefore, make no further comment on these cases, but proceed with an analysis of the cases presented by the appellees in their brief.

The appellees rely on *Tinker v. Colwell*, 193 U.S. 473, 24 Sup. Ct. 505 (1904), *In re Freche* (D.C. N.J.) 109 Fed. 620 (1901), and many others later to be discussed. These cases, which are the "forest of authority" erroneously relied upon by the Referee in Bankruptcy and by the District Court, are not authority for the narrow point of law involved in the instant case.

In Re Freche, supra, involved the seduction by the judgment debtor of the plaintiff's daughter. *Tinker v. Colwell, supra,* involved the criminal conversation of the judgment debtor with the plaintiff's wife. In both cases, the main issue was whether or not actual malice toward the plaintiff must be shown to bring the injury under the scope of Section 17 (a)(2) excepting the judgment from the discharge of the Bankruptcy Act. In both cases, it was held that because of the unconscionable character of the act involved, malice toward the plaintiff would be inferred. It is

interesting to note that a subsequent amendment to the Bankruptcy Act now specifically excepts from the operation of a discharge in bankruptcy "liabilities for the seduction of an unmarried female or for criminal conversation." (Bankruptcy Act, Sec. 17 (a) (2).)

The question of whether or not a judgment for conversion was a "liability for wilful and malicious injury to property" was first presented to the Supreme Court of the United States in *McIntyre v. Kavanaugh*, 242 U.S. 138, 37 Sup. Ct. 38 (1916). In that case, the Supreme Court held that a finding by the lower Court of "wilful and malicious injury to property" brought this judgment for conversion within the exception to the discharge of the Bankruptcy Act. An examination of the cases following the *McIntyre* case, *supra*, seems to indicate that some courts construed the mandate of that case to except all liabilities arising from a conversion from the operation of a discharge in bankruptcy. It was, no doubt, to correct this false impression and to prevent judicial inroads into the protection of debtors which the legislature intended in the enactment of the Bankruptcy Act that the Supreme Court of the United States heard the *Davis* case, *supra*, and announced that a "wilful and malicious injury does not follow as of course from every act of conversion." We contend that since the instant case involves a liability arising from a conversion, the law applicable thereto is the *Davis* case, *supra*, and the cases decided in reliance thereon, and therefore that the law on the issue here involved is this: The fact of a conversion is not conclusive. We

must look to the record behind the judgment for the conversion. If the record shows a wilful and malicious injury to property, then the judgment will not be discharged, but if the record fails to show a wilful and malicious injury, and it must be remembered that the burden is on the judgment creditor to show wilfulness and malice, then the debt must be discharged.

Let us consider the cases which appellees cite to support their argument. First cited are *Tinker v. Colwell, supra, In re Freche, supra,* and *McIntyre v. Kavanaugh, supra.* The latter case, as qualified by the *Davis* case, *supra,* is now the law of the land with respect to the issue here involved. Since the *Tinker* and *Freche* cases, *supra,* are not similar to the instant case on their facts, those cases are not controlling, and when as here we have a pronouncement by the United States Supreme Court in a case "on all fours" with the instant case, authority from analagous cases such as *Tinker v. Colwell* and *In re Freche, supra,* should be irrelevant.

The case of *McIntyre v. Kavanaugh, supra,* was distinguished by Mr. Justice Cardoza when he said in the *Davis* case, *supra,* that:

> "There is no doubt that an act of conversion, if wilful and malicious, is an injury to property within the scope of this exception. Such a case was *McIntyre v. Kavanaugh,* 242 U.S. 138, where the wrong was unexcused and wanton."

In that case (*McIntyre*) the record showed that the trial court had found that the judgment debtor had "committed wilful and malicious injury to the

property of the plaintiff." No such finding was present in the *Davis* case, *supra*, or in the instant case. Because of that factual difference, Mr. Justice Cardoza was able to distinguish the two cases.

Appellee next considers *Bever v. Swecker*, 138 Ia. 728, 116 N.W. 704 (1908). This authority antedates the leading case on this issue, the *Davis* case, *supra*, by 26 years. But more important, a close inspection of the case will show that the facts are not similar to the instant case. The Supreme Court of Iowa stated in its opinion:

> "The action of trover proceeded on the fiction that the defendant found the property and thereafter converted it to his own use, and generally was brought where the defendant came into possession of the property rightfully. * * *
>
> "The action of trespass, involved the idea of the violation of a possessory right, as well as forceful damage."
>
> "The action which resulted in the judgment in this case was not case of *trover*, but *purely trespass*. * * *" (Italics ours.)

Thus the Supreme Court did not regard this as a judgment for conversion, but purely trespass. This authority should not be of great weight here where the judgment was for conversion.

Greenfield v. Tucillo, 192 F.(2d) 854, 49 A.B.R. (N.S.) 529, (C.C.A 2, 1942) cited by appellees involved the issue of whether or not a judgment against the debtor for negligent driving was dischargeable in bankruptcy. Judge Augustus Hand, speaking for the court said:

> "It is true that the bankrupt was, on his own confession, convicted of violating * * * (Penal Law) * * * by operating his automobile 'in a reckless or culpably negligent manner.' But this is not conclusive proof that he had incurred civil liability to the objecting creditor for 'wilful and malicious injuries. * * *'
>
> "Under the circumstances disclosed we cannot say whether the claims might not be barred by a discharge. * * * We think that the issues of fact should be tried out in the state court after the determination of the discharge."

This case is not authority that should control in the instant case because the facts are entirely different. Further, because the record failed to show with sufficient clarity circumstances from which a "wilful and malicious injury" could be predicated, the case was sent back to the trial court for a determination of this issue whenever the discharge should be pleaded to prevent enforcement of the judgment.

The brief of appellees continues with the "following well known cases involving many types of conversion."

An examination of *Matter of Binsky*, 24 A.B.R. (N.S.) 496 (D.C. S.D. N.Y. 1934), *Matter of Gumbinsky*, 8 F. Supp. 601, 26 A.B.R. (N.S.) 436 (D.C. W.D. N.Y. 1934), *In re Keeler*, 243 Fed. 770, 40 A.B.R. 231 (D.C. N.D. N.Y. 1917), *Covington v. Rosenbusch*, 42 A.B.R. 400 (S.C. Ga. 1918), *In re Nordlight*, 3 F. Supp. 486, 22 A.B.R. (N.S.) 481 (D.C. S.D. N.Y. 1933), *Van Eps v. Aufdemkamp*, 32 P.(2d) 1116 (D.C. of App., 2d Dist. Cal. 1934), *Smith v. Ladrie*, 129 Atl. 302 (S.C. Vt. 1925), and *In re*

Franks, 17 A.B.R. (N.S.) 304 (D.C. W.D. Pa. 1931), indicates that they all rely heavily upon the *McIntyre* case, *supra*, that a conversion can be a wilful and malicious injury to property within the purview of Section 17 (a) (2) of the Bankruptcy Act, without a full discussion of the circumstances surrounding the conversion. As we have earlier suggested, this practice by the courts was no doubt an important factor which caused the Supreme Court of the United States to review the whole question and qualify the *McIntyre* case, *supra*, by the doctrine of the *Davis* case, *supra*. The above cited cases are not of great importance following this latter case.

Other cases cited by the appellees give a fuller discussion of the issue here involved. *In re Stenger*, 283 Fed. 419, 49 A.B.R. 224 (D.C. Mich. 1922) involved a judgment debtor who had converted funds belonging to the insurance company which he represented—a taking which was felonious in nature. That fact should distinguish those circumstances from the instant case. Similarly, in *Baker v. Bryant Fertilizer Co.*, 271 Fed. 473, 46 A.B.R. 579 (C.C.A. 4 1921), the judgment debtor had used funds which he collected on his principal's account for cotton speculation. Here again we have a deliberate conversion against the known right of the principal to receive immediate payment.

In the case of *Ex parte Goldstein*, 30 F. Supp. 443 (D.C. S.D. N.Y. 1939) a finding of "unlawful and wilful" injury to the property of plaintiff was held to be a "wilful and malicious" injury to property within the scope of the Bankruptcy Act, Sec. 17 (a) (2). The

court held that the record from the trial court on this issue was binding. So also was *Matter of Buzas*, 58 F. Supp. 717 (D.C. N.D. Col. 1944) and *In re Blauweiss*, 23 N.Y.S.(2d) 907 (City Ct. of N.Y. Queens County 1940) where findings tantamount to a wilful and malicious injury were made by the trial court. The record in the instant case shows a finding of conversion—no aggravated features are mentioned. These cited cases are not applicable here because of this factual difference.

Probst v. Jones, 247 N.W. 779, is cited by the appellees. A later Michigan case, *Continental Live Stock Co. v. King*, 283 Mich. 495, 278 N.W. 661 (1938) relying upon the *Davis* case, *supra*, as its authority states:

> "Appellant in support of its contention that the sale of its property by defendant in the instant case constituted a wilful and malicious injury within the terms of the bankruptcy statute cites and relies upon *Probst v. Jones*, 262 Mich. 678, 247 N.W. 779. However it must be borne in mind that the court found in the cited case that 'defendant did not act in good faith.' The finding in the instant case is directly to the contrary, and in consequence thereof the law of the *Probst* case is not here applicable."

Since there is no finding of bad faith in the instant case, the *Probst* case, *supra*, should be likewise inapplicable here.

In *Woelfle v. Giles*, 184 S.W.(2d) 177 (S.C. Tenn. 1945), cited by appellees, the court relying upon the *Davis* case, *supra*, held that the judgment for conversion was dischargeable in bankruptcy because it

was "innocent and technical" to be distinguished from the *McIntyre* case, *supra*, where the conversion was so "unexcused and wanton" that it was clearly criminal. There is nothing in the *Woelfle* case, *supra*, inconsistent with the status of the law for which appellants are contending.

Appellees also cite *In re Stark*, 18 A.B.R. (N.S.) 278, *Globe Indemnity Co. v. Gronskov*, 246 Wis. 87 16 N.W.(2d) 437 (1944), *Weeks v. Streicher*, 58 N.E.(2d) 415 (Ct. of App. of Ohio, Lucas County 1943), and *Matter of Minsky*, 46 F. Supp. 104 (D.C. N.Y. 1942). Since these cases do not involve a conversion, as authority for the instant case they are not in point.

A careful examination of all the cases cited by appellees shows no authority which indicates that the status of the law on this issue is different from that set forth by appellants. If we may repeat, the law applicable here is this: A wilful and malicious injury does not follow as of course from every act of conversion without reference to the circumstances. To determine whether or not there is a wilful and malicious injury, resort must be had to the record. And the burden rests upon the appellee to show wilfulness and malice.

Turning now to a consideration of the circumstances of the conversion in the instant case to determine whether or not it was a "wilful and malicious" injury to property, we are, as a matter of law, confined to a consideration of those circumstances as presented by the record from the trial court.

Examining first the conclusions of law of the trial court we find: "That the defendants, Clarence A. Rees and Evelyn E. Rees, his wife, have *converted* personal property. * * *" (Italics ours) No mention is made of a wilful or unlawful or a malicious conversion. We must then look further to the pleadings and to the Findings of Fact to see if we find circumstances upon which to predicate wilfulness and malice.

It is contended by appellees in their argument that "the issue of unlawful, intentional conversion was placed squarely before the court" by the allegations of the second cause of action in appellees' Amended Complaint. The appellees' second cause of action alleged facts calculated to show adverse possession of the north 65 feet of the Skirving property for the prescriptive period by the appellees. As a part of this second cause, and the only part that could conceivably be the pleading of the issue of conversion which appellees contend appears in their complaint, the appellees allege that the improvements on the land were no part of the consideration paid for the Skirving property. They further allege that they have been wrongfully denied the use and income of the property—referring to the realty that they described previously to which realty they want title quieted in the appellees by reason of their adverse possession. This contention that they have by these allegations stated a cause of action for conversion is without merit. But even if it does allege a conversion, there is no allegation of wilfulness and malice and more important, no facts appear in the record upon

which such a finding of wilfulness and malice can be predicated.

Appellees argue that the allegations set forth in the preceding paragraph were admitted by the appellants. The record does not so indicate! The appellants alleged by way of an affirmative defense that a sale of the Skirving property "was consumated, the property being described by a metes and bounds description and *including appurtenances.*" This allegation is a denial of appellees' allegation that "said improvements were no part of the consideration of said sale." With respect to appellees' contention that they have been wrongfully denied the use of their property, the appellants claimed both tracts as owners of the fee. The trial court recognized this as a proper claim when it refused to quiet title in appellees to any of the realty involved in the suit below. This allegation of the purchase of the appurtenances and an assertion of their, appellants', ownership of the land and appurtenances is certainly a denial of appellees' allegations.

When the trial court denied the appellees' claim to tax lot 4 and to the north 65 feet of the Skirving property and then went on from there to announce the conversion and judgment therefore, the appellants were completely surprised. The real estate contract between Cora Skirving and appellants (R. 61-63) upon which appellants based their claim to the Skirving property refers to the buildings (for insurance purposes) and then goes on to include the appurtenances. The finding of the trial court that:

> "* * * at the time of her sale of said property to the defendants, Clarence A. Rees and wife, said structures were not included in the sale and no consideration was given for them, or either of them. That the defendants Rees and wife never at any time believe they were purchasing said structures, or either of them, having been advised at the time of their purchase that the buildings were no part of the property purchased."

is in direct contradiction to the above mentioned contract of sale reduced to and evidenced by the writing introduced into the record. This point is made, not to criticize the trial court for what seems to be an unwarranted conclusion, but to show that the conduct of the appellants in asserting ownership to land and appurtenances under a contract for the purchase of same was eminently reasonable, that such conduct was not wilful or malicious within the meaning of the Bankruptcy Act.

Examining the Findings of Fact to see what light they throw on the issue of a wilful and malicious injury we see that the trial court found, inter alia, the following pertinent facts:

> "That at said time it was the general belief of both plaintiffs (appellees) and the defendant Skirving that the north 65 feet belonged to tax Lot 4, and said defendant agreed that said buildings might be permanently located at the place of removal under that belief.
>
> "* * * and that at the time of her sale of said property to the defendants, Clarence A. Rees and wife, said structures were not included in the sale and no consideration was

> given for them, or either of them. That the defendants Rees and wife never at any time believed they were purchasing said structures, or either of them, having been advised at the time of their purchase that the buildings were no part of the property purchased."

Appellants are by these findings charged with notice that the appurtenances were not conveyed with the deed to the Skirving property despite the fact that the contract of sale purported to convey the appurtenances. Yet these findings do not, nor does any other finding, show that the appellants knew that they did not own the appurtenances. As appellants stated in their brief, it was the belief of all parties to this litigation that the buildings were on Tax lot 4. There is no finding that appellants knew that the buildings were on the Skirving property. There is no finding that the appellants could not have reasonably believed that the buildings were on Tax lot 4; further the trial court specifically refused to find that "at the time of the purchase of said property the defendants Rees and wife knew the value of said property was greatly in excess of the amount paid." There is, then, nothing in the record inconsistent with the theory that the appellants purchased Tax lot 4 believing that the buildings were located thereon and that the assertion of ownership to the buildings was because of the reasonable belief that they owned them.

It is easy by hindsight, when the spotlight of investigation has been put upon a particular set of circumstances during the course of litigation, to grasp

at particular events and say: "They point to wilfulness and malice." But the proper question to which our minds here should be addressed is this: In the light of the circumstances attending the assertion by the appellants of their ownership of the land and appurtenances here in question, was this act done under the belief that they owned said appurtenances, which belief was eminently reasonable in view of the situation as it was then presented to them, or was it a wilful and malicious taking of property which they well knew they did not own?

Let us set forth the circumstances attending the conversion here in question. The appellants desired to purchase the tract of land consisting of Tax lot 4 and the Skirving property. When this purchase was arranged for, appellants notified (R. 64-65) the appellees to vacate Tax lot 4. In this notice (R. 64-65), it was stated:

> "There is a dwelling house located in part, possibly, upon this property, but Mr. Rees has purchased other real estate joining this, and consequently is entitled to the dwelling house regardless of whether the same is located upon the real estate hereinabove described, or upon the other tract of real estate which has been purchased by Mr. Rees."

Shortly thereafter, appellees commenced a suit against the appellants to quiet title in appellees to Tax lot 4 on the ground of equitable frustration; this suit was commenced because they no doubt believed that the buildings were on Tax lot 4. If they so believed, how then can they argue that it was un-

reasonable for the appellants to believe that the buildings were on Tax lot 4 and that they, appellants, had received the buildings with the conveyance from King County? As before stated, the trial court by refusing to make a finding tantamount to knowledge that the buildings were not conveyed with the deed to Tax lot 4, admits the reasonableness of appellants' belief in this respect.

The next step came after appellants discovered by means of a survey that the buildings were in fact upon the Skirving property. Thereupon the appellees amended their complaint to include a second cause of action alleging facts calculated to show adverse possession by appellees of the north 65 feet of the Skirving property. Appellees were still proceeding, apparently, on the theory that the buildings are fixtures and go with the land. It was after the trial court had refused to quiet title in the appellees to either tract that they, appellees, met the fortuitous circumstance which has continued this litigation. The trial court found a conversion! Then the appellees go back to their pleadings to try to show that they have always considered the appurtenances as personalty. Appellees are now trying to show, when we have the benefit of the trial court's decision before us, that the act of the appellants, in asserting a claim to property which they reasonably believed was their own, was a wilful and malicious injury to property. They point out several circumstances which, they contend, show a wilful and intentional conversion. In our opinion, they have pointed to nothing in the record which is inconsistent with our contention that

the appellants were here acting in pursuance of a property right which they honestly and reasonably believed they had.

We believe that a comparison of the facts of this case with those of the cases cited in appellants' brief, cases which appellees have tried neither to refute nor to distinguish, will lead the court to conclude, as we do, that the record here does not show a wilful and malicious injury to property which excepts this liability from the operation of discharge in bankruptcy.

We content therefore that the appellees have not met their burden of proving this act to be a wilful and malicious injury to property.

Respectfully submitted,

COLVIN & WILLIAMS,
Attorneys for Appellants.

DAVID J. WILLIAMS,
MARY E. BURRUS,
of Counsel.

Central Building,
Seattle 4, Washington.